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Nos. 778, 779, 830, 831, 832, 833, 834, 835, and 836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,
NORFOLK AND WESTERN RAILWAY COMPANY,
OSCAR GRUSS & SON,
NEW YORK, NEW HAVEN AND HARTFORD R.R. CO. FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,
ERIE-LACKAWANNA RAILROAD COMPANY, *et al.*,
BOSTON AND MAINE CORPORATION,
READING COMPANY,
CITY OF SCRANTON, *et al.*,
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, *et al.*,

Appellants,

—v.—

UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY OF THE DELAWARE AND HUDSON RAILROAD CORPORATION TO MOTIONS TO AFFIRM OF OTHER PARTIES

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The Jurisdictional Statement of EL and D&H* in No. 832, together with the briefs of D&H in the District Court of August 8 and September 12, 1967 in the *Merger* case, demonstrates that the Commission erred in not reserving jurisdiction to require a capital loss indemnification of EL and D&H by Penn-Central should judicial review and remand of the N&W *Inclusion* case result in a downward

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*All abbreviations are those used in D&H's Motion to Affirm dated November 27, 1967.

revision of the terms for inclusion because of the traffic consequences of a Penn-Central merger. As there explained, this condition is grounded on the public interest in maintaining rail competition to the extent feasible after consummation of the Penn-Central merger.

Penn and Central, in their Motion to Affirm in Nos. 778 and 832 (pp. 19-22) oppose the appeal of D&H and EL in No. 832 in this regard solely on the argument that the Commission lacks authority under Section 5(2) of the Interstate Commerce Act, 49 U. S. C. §5(2), to impose a capital loss indemnity condition on Penn-Central. Their contention is (*id.* at 22) that securityholders of D&H and EL run the risk of impairment of the value of those roads to N&W by an authorization of Penn and Central to merge and that nothing in the Act *requires* compensation for such impairment.

There is no merit to this contention. Section 5(2) of the Interstate Commerce Act provides that Commission authorization of a merger transaction shall be subject to such terms and conditions as the Commission shall find to be "just and reasonable." Certainly there is nothing in the Act which *prohibits* compensation for such impairment of value; and if, under the unique circumstances of these interrelated *Merger* and *Inclusion* cases, such compensation is "just and reasonable" in order to achieve the goal of competitive rail systems in the East, then the Commission clearly does have authority to require such compensation.*

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* In its discussion of this matter, the State of New York in its Motion to Affirm lists (p. 17) other questions which it says must be decided in the affirmative by this Court before it can determine that the Commission erred in failing to retain jurisdiction to impose a

Were it not for the single, but major, public interest consideration of providing system rail competition in the area east of Buffalo, D&H, for example, could be, and no doubt would be, included in the Penn-Central system itself. As Penn and Central themselves point out in their Motion to Affirm in Nos. 830 and 831 (p. 19), the Commission has already determined in the case of NH not to reduce the price Penn-Central should pay for NH because of the adverse effects of a Penn-Central merger on NH. Penn and Central have further conceded that if D&H and EL were to be included in Penn-Central, the adverse effects of the Penn-Central merger on D&H and EL should not affect the price for such inclusion (Transcript before the Commission in the *Merger* case, pp. 21205-06).

It is similarly fair and appropriate, if D&H must join N&W rather than Penn-Central in order to satisfy the public interest in continued rail competition, that D&H should not be required to suffer a cut in the price N&W would otherwise pay because of the adverse effects on D&H of a Penn-Central merger unless D&H receives compensation therefor from Penn-Central. The same is true as to EL on whose inclusion in N&W D&H inclusion has been made dependent. Terms requiring such a reduction in the price N&W would pay without compensation from Penn-Central would not, under the circumstances of these cases, be "equitable" to D&H as the statute requires.

This is the position taken by Commissioner Webb in his Recommended Report, served December 22, 1966, in the *Inclusion* case where he said (p. 28) that the inclusion of D&H, EL and B&M

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capital loss indemnity condition on Penn-Central. Such other questions are initially for the Commission on any remand in the *Inclusion* case based on N&W's appeal in No. 779, not this Court.

"in the system chosen by the Commission in the furtherance of national transportation objectives should not be on terms which reflect any diminution of capital value attributable to the traffic diversion impact of the other system. In other words, the petitioners should not be penalized for anticipating the Commission's desire to preserve rail competition in the territory they serve. Whether or not the Commission should require capital loss indemnification to facilitate inclusion of petitioners in N&W is a matter which, presumably, will be determined in the light of further hearings in the Penn-Central case if such a determination seems necessary or desirable."

The full Commission's decisions in the *Merger* and *Inclusion* cases in no way cast doubt on the soundness of this position but, rather, go off on the Commission's finding that there would be no net adverse effect on the traffic of the petitioners after inclusion in the N&W system on account of the Penn-Central merger.

In connection with this matter, NH suggests, in its Motion to Affirm (p. 20), that the Commission's general reservation of jurisdiction in the Penn-Central merger case is sufficient to enable the Commission to impose a capital loss indemnity on Penn-Central *after* the Penn-Central merger is consummated. Clearly no one can be expected to rely on such a general reservation when (a) the Commission has expressly denied the petition of EL for reconsideration requesting the Commission to reserve jurisdiction to impose a capital loss indemnity condition on Penn-Central (Supplemental Order in the *Merger* case, dated Sept. 8, 1967) and (b) the opinion of the District Court is to the effect that such a condition may be imposed only if this Court so directs (J. S. No. 778, B-16-17,

B-69). Penn and Central obviously do not regard the general reservation of jurisdiction (which they have accepted) as sufficient to permit imposition of such a condition after the merger, or they would not now be contending that the Commission lacks statutory authority to impose the condition.

To conclude: D&H has pointed out in its papers in the *Inclusion* case why the Commission's finding that N&W is not entitled to a reduction in the price for D&H or EL because of the effects of a Penn-Central merger is a sound finding supported by the evidence of record. However, if the Commission's finding in this regard is upset by this Court and the matter remanded to the Commission for further proceedings in the *Inclusion* case, the Commission should be directed to retain jurisdiction in the *Merger* case to impose on Penn-Central a capital loss indemnity provision in the event it is ultimately determined that the terms for inclusion of D&H or EL in N&W must be revised downwards because of the adverse effects of Penn-Central. In the event of any such remand, such a condition would serve the public interest in establishing competitive system rail service east of Buffalo and thus accommodate the Penn-Central merger to the policies of the antitrust laws.

Respectfully submitted,

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